Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 104.

THE GERMAN SAVINGS AND LOAN SOCIETY, PLAINTIFF IN ERROR,

vs.

DORA MAY DORMITZER, WILLIAM L. TULL AND ERNEST B. TULL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

BRIEF FOR DEFENDANTS IN ERROR.

In replying to the brief filed by the plaintiffs in error, I ask leave to refer to the briefs of points, authorities and arguments heretofore submitted by the defendants in error and the minor defendant in error upon the motions to dismiss or affirm, and respectfully to insist upon the propositions laid down in those briefs.

FIRST.

The Divorce and Its Incidents.

The Society, in its pleadings, sets out the Kansas divorce and the laws of Kansas relative to property rights of the

wife after death of the husband, or divorce. It claims, in argument, that the husband brought the proceeds of the sale of the Kansas property into Washington and with them purchased this property, which thus became his separate property. But the contract of purchase was made in December, 1886. The divorce decree was not entered until May, 1887. It is necessary to hold that the effect of the Kansas divorce was to divest the wife of all claim to her husband's property in Washington, though acquired before the divorce.

> The power of the State to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer, and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners, is undoubted. It is an established principle of law, everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated.
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> *United States* v. *Fox*, 94 U. S., 315 ;
> *Arndt* v. *Griggs*, 134 U. S., 316.

Van Cleaf *v.* Burns, 133 N. Y., 540, was a case in which the plaintiff sought to recover dower in certain lands, in the city of Brooklyn, of which her husband was seized during their marriage. The husband had obtained a divorce from the plaintiff in the State of Illinois upon the ground of her abandonment. As to the effect of the judgment upon the property rights of the wife, the Court said :

> This judgment is, therefore, conclusive evidence in this State that the parties were divorced as therein stated, and for the cause therein set forth. The effect which such a divorce has upon the lands of the husband in the State of Illinois must be determined by the

> law of Illinois. The effect which it has upon the lands of the husband within this State must be determined by the laws of this State. The sovereignty of Illinois cannot extend beyond its territory, and the legislature of that State has no power to enact what shall be the effect of a judgment of one of its own courts upon the real estate situated within another sovereignty. It has made no such attempt. As to this question, full faith and credit are given to the judgment of a court of a sister State when the same effect upon rights of property within the jurisdiction of that State is given to such a judgment as is given to it by the law of the State where rendered. The judgment is not open to any inquiry upon the merits.

The Society contends also, that apart from the divorce, the husband was the owner of the Kansas property, and that, therefore, the property purchased in Washington with its proceeds was his separate property.

In view of these independent contentions it is difficult to see how, under the circumstances of this case, the matter of full faith and credit to the Kansas decree as a Federal question is necessarily involved.

It is claimed that by the laws of Kansas the wife was obliged to join her husband in all conveyances of his real estate. The proofs show that conveyances for all of his property had thus been made before the application for divorce, and, therefore, upon this theory, her rights had been extinguished. The Washington Supreme Court says:

> The only proof offered as to the laws of Kansas is not as to the status of property during the continuance or existence of the community, but as to the effect of a dissolution by death or divorce. (Tr., 349.)

If the husband survive the wife and this construction of the law is correct, the rights of property are the same

whether the dissolution of the marriage was by death or divorce.

The supreme court of the State of Washington found as facts that the Kansas decree of divorce was procured by fraud; that Tull was not a resident of the State of Kansas at the time he filed his bill for divorce; that Lucy A. Tull was not a resident of the State at the time; that no service was had upon her in that State; that the pretended appearance of an attorney and the filing of the answer were unauthorized, without her knowledge, and fraudulent. (Tr., 343 to 349.)

Tull and his wife were married in 1872, at the residence of the wife's parents in Harrison county, Missouri. They lived together until January 1887, when the wife went to her father's home in Missouri. Tull had determined to break up his residence in Kansas, which was then the matrimonial domicil, and establish a new home in the West. He proceeded, with the knowledge and assistance of his wife, to convert this Kansas property into money for that purpose. The evidence clearly shows that her departure was on no other account. Tull filed his bill for divorce February, 25, 1887, in which he alleges that his wife had committed adultery with many persons whose true names were unknown, and specifying one case, but with a person unknown, in September, 1884.

On the same day summons was asked to issue to the Sheriff of Harrison County, Missouri. This writ does not appear to have been issued. An alias summons issued March 23, 1887, directed to Sacramento County, California. This latter summons was returned as served on April 2, 1887, but no proof of the service, as required by the statute, was made.

Tull himself, in testifying, states that he sold out his business in Kansas before 1887. He says (Tr., 77):

> Prior to December, 1886, I had sold out everything in Kansas. I sold out my business and started out to hunt a new location. I went to Southern California and up to San Francisco and around Seattle and Tacoma and Portland, and landed here and bought—made this purchase and located here. I decided to locate here and came back here as soon as I could get here. I went back to Kansas and wound up my affairs there preparing to come here as soon as I could get here.

There is much more of this testimony, which is referred to in the opinion of the Supreme Court of Washington and in the briefs of counsel in this Court. It is, therefore, clearly shown that long before the filing of the complaint in the divorce case Tull had closed out his business in Kansas, with the intention of removing therefrom. After various excursions he had determined to locate in Spokane, had purchased property there, made arrangements to improve it, and left Spokane with the intention of returning. He had also removed his family from Kansas. This record discloses that after the visit to Spokane in December, 1886, he never did return to Kansas except to settle up some necessary business. Upon these facts the Supreme Court of Washington decided that at the time of the filing of this complaint Tull had no domicil in the State of Kansas. There is a peculiarity in this case, distinguishing it from the cases, to which the court has been referred, of Andrews *v.* Andrews, Bell *v.* Bell, and Streitwolf *v.* Streitwolf. Here there was no endeavor upon the part of the plaintiff to obtain a domicil for the purposes of divorce. Here, having abandoned the domicil, it was deemed more convenient and less liable to detection to secure, upon fraudulent grounds, a divorce at the place of the former residence. The facts that the wife, without charge or suspicion, was quietly removed to her father's

home, her children accompanying her; that a bill for divorce on the ground of adultery was almost simultaneously presented; that process was sought to be had by publication; and that means were taken to prevent any knowledge to her, all show the fraud that was attempted to be perpetrated upon her.

The service in California, which is the only service claimed to have been had, was not in accordance with the statute. There is an exemplification of the record, which was given in evidence. That shows a certificate purporting to have been made by the sheriff in California, but fails to show what the statute required—an affidavit that service had been made.

It will be observed from the statute of Kansas, relating to divorce, introduced into evidence, that upon a decree against the wife the court shall also decree what her property rights shall be. The decree rendered in Kansas did not do this. It was a decree dissolving the bonds of matrimony—that and nothing more.

After Tull had established himself in Spokane and Mrs. Tull became advised of the existence of this divorce, she, with her children, proceeded there and immediately filed a bill in chancery to set aside the decree of divorce and be restored to her rights of property. In that bill she sets up that she and her husband had owned the Kansas property in community; that for the purpose of enabling him to make a new home for them she had consented to and had executed the conveyances necessary to enable him to settle the property. She denied all knowledge of the divorce, all of the allegations of the bill, all notice of the pendency of the suit, and made other and serious charges against him. It is only necessary for the purposes of this argument to say that this bill was filed on the 28th day of July, 1887, and that on the 30th day of July, two days after, the parties

entered into a stipulation that the suit should be dismissed. Immediately afterwards they were re-married. F. M. Tull testifies with regard to these matters (Tr., 205):

> "Q. After she came to Spokane, state whether or not there was a marriage ceremony performed between you and her, and, if so about when?
>
> "A. I do not know exactly—it was either the last of July or first of August, somewhere around there."

And page 206:

> "Q. Did you and Lucy A. Tull, previous to the performance of this last marriage ceremony, have a mutual agreement as to the status and condition of your property and your property rights, and if so, state what it was?
>
> "A. Well, we had an agreement; we settled up our back difficulties, and she agreed to withdraw the suit, and we remarried again."

And page 208:

> "Q. State fully, Mr. Tull, what the original agreement between you and her was?
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> "A. Well, we simply agreed to fix up our past, our differences, and remarry, let her have the interest in the property as she had had. I say we agreed to remarry and she would withdraw the suit, and she should have an interest in the property, and there was no specific amount she should have, that she should have the interest in the property and settle up the business as man and wife, *and the property be together.* That was all there was to it."

These parties having come together, having composed their differences and agreed upon the relations which should thereafter exist between them, there were but two courses to be pursued: they could endeavor to set aside the disgraceful and fraudulent decree; or, avoiding scandal and morti-

fication, they could quietly remarry and reunite the broken threads of their lives. They chose the latter course. "We had an agreement; we settled up our back difficulties, and she agreed to withdraw the suit, and be remarried again." And into their agreement—into their reconciliation—entered the settlement of their respective interests in the property.

Mrs. Tull claimed, in the suit she brought, that the property in Kansas was the common earnings and accumulations of her husband and herself and was community property. Tull says the understanding was to "let her have the interest in the property as she had had; she should have an interest in the property, and there was no specific amount she should have, that she should have the interest in the property and settle up the business as man and wife, and the property be together."

The inquiry in this case is whether the property, at the time of the death of Mrs. Tull, was community property, or the separate property of the husband. The Washington Supreme Court held the presumptions were it was community property in Kansas:

> "In the absence of proofs of the laws of another State in relation to the property rights of husband and wife as to property acquired there during marriage, it has been held that they will be presumed to be the same as those of the State where the proceeds of such property have been re-invested. *Marsters* v. *Lash*, 61 Cal., 622; *Shumway* v. *Leakey*, 67 Cal., 458; *Mortimer* v. *Marder*, 93 Cal., 172. This court has held that under the statutes of this State lands acquired after marriage by a deed of purchase expressing a money consideration are presumed to be community property, and the presumption can be rebutted only by clear and convincing proof that the consideration was furnished out of the grantee's separate property. *Yesler* v. *Hochstettler*, 4 Wash., 349.

"From the view we take of the case it is not necessary to further discuss the subject of presumptions. But it seems, even from the laws introduced in evidence by respondent, that dower and curtesy are abolished in Kansas and one-half of the real estate, after paying debts, on the death of one spouse passes to the other, thus showing that the common law is no longer in force in this respect at least; and, if anything is to be presumed, these facts might warrant the presumption that Kansas had a system somewhat similar to our own." (Tr., pp. 349–350.)

Now, conceding for the purposes of this argument, that the Kansas divorce was valid, what effect did this reconciliation, agreement and remarriage have upon the property rights of the wife? It is not at all necessary there should be a code or a statute for the existence of an estate in community. It may be created by contract, by consent. It is not known in the Digest, and yet community property is familiar in the civil law. It has its origin in the Spanish law. Under that law adultery of the wife was punished by the loss of her ganancial property and by secluding her in a convent. But if there was a reconciliation and a pardon by the husband, she was restored to his house and to her property rights.

Partida 7 a, tit. XVII, ley 15 (translated):

"If the husband should desire to pardon her after this, he may do so within two years; and if he should pardon the error, she may withdraw from the monastery and return to his house; and if he should receive her so, we say that the portion the husband settles on the wife and the other things which they have jointly ought to be restored to that condition in which they were before the adultery had been committed."

(Codigo Civil, Scævola, vol. 2, p. 216.)

"One of the consequences of adultery by the wife seems always to have been the loss of her share of the ganancial property (quoting authorities). This, however, she might regain if her husband was reconciled to her within two years, but if he did not forgive her, or if he died before the lapse of two years, then she was confined to the monastery for life."

Wheat v. *Ogden*, 15 Tex., 241, 246.

Of course, divorces were unknown to that law. But the re-marriage opens the door of restoration as did the reconciliation. The property rights are regained. If it were attempted to enforce as harsh a doctrine as that the divorce deprived the wife of property rights and so finally dissolved the matrimonial compact that they could not be restored, then the principle could be established by a mutual agreement. And this would be in no sense, as suggested, the creation of an estate.

In the case before us all this was so. There were no rights obtained by the society in reliance upon the decree. None of the transactions of loan was entertained until after the re-marriage, and the establishment, in the way we have mentioned, of the community in all the property.

SECOND.

The Estoppel.

The Supreme Court of Washington decided that the society was estopped from disputing the title of the defendants in error. That court said (Tr., 578):

> When Lucy A. Tull died respondent refused to go on with the loan until the interest of the children was transferred to the father. F. M. Tull and the respondent dealt with the property as a whole on the basis that the children had a one-half interest therein. F. M. Tull and Lucy A. Tull had agreed as to the status of

the property before her death, and this status was recognized by the respondent; but the presumption that it was community property not having been overthrown it is not necessary to further comment on the effect and character of this estoppel.

The Supreme Court goes on at great length to examine the testimony as to the inception and character of the loans. The proposition for the first loan was made in the lifetime of Mrs. Tull. Before the transaction was completed Mrs. Tull died. The parties representing the Society refused to go on with the loan unless F. M. Tull could show a clear title to the property and unless the children's interest was disposed of. P. D. Tull, the uncle of these children, filed a petition to be appointed as guardian, upon which F. M. Tull, their father, endorsed the request that he be so appointed. The appointment was made and F. M. Tull became one of the sureties upon his bond. Applications were made for the sale of the property of the minors and F. M. Tull became the purchaser. In all these proceedings it was stated that the minors were entitled to a one-half interest in this property as heirs of their mother. Clearly Tull and those in privity to him were estopped by record from denying the title of these children.

The court found that the probate proceedings were for the purpose of vesting the title to the entire piece of property in the father so that he might mortgage it to the respondents in order to get money to go on with the buildings then in course of construction. Guardian deeds then having been made to F. M. Tull, he became the owner of the entire interest, these deeds reciting all the probate proceedings. This being made satisfactory to the Society, the loans were effected. The Supreme Court holds that they were bound by actual notice of the one-half interest of the children in this property, or at least were put upon inquiry

which should be had by any person who was prudent or not guilty of gross negligence. To repeat the facts as found by the Supreme Court of Washington: After the death of Mrs. Tull the Society refused to go on with the loan until her estate was probated and the rights of her children as her heirs adjudicated; all the parties concerned and their counsel treated the property as community property and deemed it necessary to divest the title and transfer it to the father, F. M. Tull; the probate court determined the facts as to the one-half interest of the children and the one-half interest in the father; F. M. Tull became the purchaser at the sale and thereby owner of the whole estate and thereupon the Society made the loans and took the first mortgages from F. M. Tull. The court determined that the Society was estopped from asserting that the property was not community estate and that these defendants in error did not inherit an undivided one-half as heirs of their mother.

What may have been the motive of the Society in its conduct and acts in negotiating the loans need not be enquired into here. The court did not fasten its determination of the estoppel upon the presumptions of community property. It was an independent determination. There was no intimation that the children had no original right to the property. On the contrary, the court held they had, and that this was affirmed and recognized by the Society.

ROBERT A. HOWARD,
LUCIUS G. NASH,
Counsel for Defendants in Error.